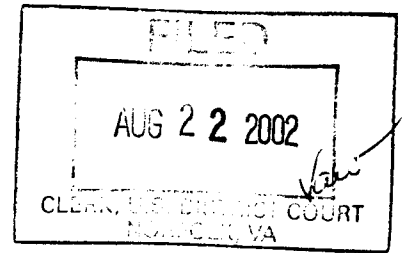


UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION



Yaser Esam Hamdi
Plaintiff

v.

Donald Rumsfeld
Defendant
and
Friends of Immigration Law Enforcement
Defendant-intervenor

Civil Action No. 2:02CV348 439
Hon. Robert G. Doumar
U.S. District Court

FRIENDS OF IMMIGRATION LAW ENFORCEMENT'S MOTION TO INTERVENE

The Friends of Immigration Law Enforcement, a non-profit public advocacy group, hereby moves to intervene in the above-captioned case as a party-defendant, pursuant to Rule 24 of the Federal Rules of Civil Procedure.

In support of this motion, the Friends of Immigration Law Enforcement submits:

1. The detainee at issue in this case, Yaser Hamdi, was seized as an enemy combatant and taken into control of the United States military in Afghanistan, after the Taliban unit he was with surrendered. The military determined that Hamdi should be detained as an enemy combatant with potential intelligence value. Hamdi was transported by the United States military from Afghanistan to the Naval Base at Guantanamo Bay, Cuba. Upon discovery of records indicating Hamdi was born in Louisiana, he was deemed a citizen of the United States by virtue of said birth, and transferred to the Naval Brig in Norfolk, Virginia, where he is currently detained. However, Hamdi is not a U.S. citizen. Hamdi appears to be a Saudi national and is illegitimately claiming the rights of a U.S. citizen.
2. Rule 24(b) of the Federal Rules of Civil Procedure provides for permissive intervention when "an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b).
3. The Friends of Immigration Law Enforcement (FILE) meets the requirements of Rule 24(b) because FILE has shown that the circumstances of Hamdi's birth do not grant him U.S. citizenship, the fact of which citizenship is central to the matter before the court in this case. (See: Complaint in Intervention enclosed)
4. FILE and the people of the United States have a strong interest in the proper and accurate determination of citizenship.

50

5. Both Defendant and FILE claim it is in the national interests of the United States that Hamdi not be granted certain constitutional rights normally granted citizens of the United States.
6. The Friends of Immigration Law Enforcement's intervention is timely. No dispositive actions by the Court have yet been accomplished.

Wherefore, the Friends of Immigration Law Enforcement requests that this Court allow it to intervene.

Respectfully Submitted,

Craig Nelsen
Director
Friends of Immigration Law Enforcement
PO Box 8122
Omaha, NE 68108-0122
402 341 0565

Certificate of Service

I hereby certify that a copy of this motion to intervene has been mailed certified, return receipt requested on this 19th day of August, 2002, to:

GREGORY G. GARRE
Assistant to the Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
202 514 4283

FRANK W. DUNHAM, JR.
Office of the Public Defender
150 Boush St., Suite 403
Norfolk, VA 23510
703 600 0800 (Alexandria)

LAWRENCE R. LEONARD
Managing Assistant United States Attorney
Eastern District of Virginia
101 West Main Street
8000 World Trade Center
Norfolk, VA 23510-1646
757 441 6331



Craig Nelsen
Director, Friends of Immigration Law Enforcement

Aug 19 2002

Birthright citizenship and the case of Yaser Esam Hamdi

Yaser Esam Hamdi was born on September 26, 1980 at Woman's Hospital in the Parish of East Baton Rouge, Louisiana to Esam Fouad Hamdi and Nadiah Hussen Fattah, both Saudi nationals.¹ At the time of Mr. Hamdi's birth, his parents resided in Baton Rouge, Louisiana.² Mr. Hamdi's father worked as a chemical engineer for the Saudi Arabia Basic Industries Corp. After three years in the United States, the Hamdi family returned to Saudi Arabia.

U.S. forces captured Mr. Hamdi in Afghanistan in December 2001 while he was fighting either for al Qaeda or for the Taliban.³ He has apparently claimed American citizenship since his detention. On or about January 11, 2002, the United States Government transferred Mr. Hamdi from Afghanistan to the U.S. Naval Base at Guantanamo Bay, Cuba.⁴ The U.S. Government subsequently transferred Mr. Hamdi from Guantanamo Bay to a military jail at the Norfolk Naval Station in Norfolk, Virginia on or about April 6, 2002.⁵

The following memorandum will show that Mr. Hamdi is not a U.S. citizen. This memorandum will comprise two sections:

I. The Fourteenth Amendment does not grant birthright citizenship to persons in Mr. Hamdi's circumstances.

- a. Amendment's "subject to the jurisdiction of" requires an allegiance not possible by illegal aliens, tourists and temporary workers
- b. Legislative intent clearly not to include persons in Mr. Hamdi's circumstances

II. The particular circumstances of Mr. Hamdi's birth have never been determined by the Supreme Court to warrant automatic *jus soli* citizenship, and, in fact, judicial precedent argues against birthright citizenship for Mr. Hamdi.

- a. Fourteenth Amendment excludes children of aliens generally (Slaughterhouse Cases (83 U.S. 36 (1873)))
- b. Distinction drawn between children of aliens and children of citizens (Minor v Happersett (88 U.S. 162 (1874)))
- c. Temporary submission lacks the permanence inherent in a complete surrender to jurisdiction (Cruikshank case (92 U.S. 542 (1875)))
- d. "Subject to the jurisdiction" requires "direct and immediate allegiance" (Elk v. Wilkins (112 U.S. 94 (1884)))
- e. Automatic birthright citizenship especially not applicable in Mr. Hamdi's case (Wong Kim Ark case, 169 U.S. 649 (1898))
- f. Supreme Court has never expressly confirmed birthright citizenship for the children of illegal aliens, temporary workers, and tourists (Plyler v. Doe, 457 U.S. 202, 211 n.10 (1982))

¹ Louisiana Certificate of Live Birth 117-1980-058-00393

² Id.

³ See Respondent's Emergency Motion for Stay Pending Appeal at 2, 4, Hamdi v. Rumsfeld, (E.D. Va. 2002) (No. 2:02cv382)

⁴ Petition for Writ of Habeas Corpus at 17, Hamdi v. Rumsfeld, (E.D. Va. 2002) (No. 2:02cv439)

⁵ Id. at 19

Memorandum:

The Fourteenth Amendment does not grant birthright citizenship to persons in Mr. Hamdi's circumstances.

The executive and legislative branches of the government have permitted the custom of granting automatic birthright citizenship to the offspring of illegal aliens, temporary workers, and tourists when these children are born on U.S. soil. However, the Fourteenth Amendment—on which the practice is said to be based—by no means mandates this custom.

This fact is made obvious when one considers that it took an act of Congress in 1922—more than a half century after the enactment of the Fourteenth Amendment in 1868—to include American Indians in birthright citizenship. If the Fourteenth Amendment provided blanket inclusion for every child born within the borders of the United States, there would have been no need for *statutory* inclusion of the children of Native Americans.

Furthermore, the current practice—long recognized by the courts—of excluding the children of foreign diplomats from birthright citizenship demonstrates that the Amendment allows for the exclusion of certain children born in the United States based on the legal status of their parents.

Amendment's "subject to the jurisdiction of" requires an allegiance not possible by illegal aliens, tourists and temporary workers

The Citizenship Clause of the Fourteenth Amendment reads, "[A]ll Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."⁶ And section 1401 of Title 8 of the U.S. Code reads, in part: "The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof"

The phrase "subject to the jurisdiction thereof" was included in the Amendment the close of the Civil War, when Congress sought to establish a uniform national rule for naturalization to defeat the political currents that might prevail in any one state. In particular, the language was designed to prevent states from depriving freed slaves and their descendants of U.S. citizenship. But the drafters of the Fourteenth Amendment could not have predicted the impact this language would have on immigration regulation in the modern era of burgeoning populations, widespread and easy global travel, and new and threatening demographic realities.

The "jurisdiction" that one is "subject to" referred to in the Citizenship Clause is a political one and requires a reciprocal obligation of complete allegiance and protection. Peter H. Schuck, professor of law at Yale University, has written that the words "subject to the jurisdiction thereof" were intended to exclude from automatic citizenship people born on U.S. soil whose allegiance to the United States was not complete.⁷

In the landmark 1898 Wong Kim Ark case, Justice Gray referred to his earlier opinion in *Elk v. Wilkens* as the "only adjudication made by this court" on the meaning of the "subject to the jurisdiction thereof" clause. He noted that in *Elk v. Wilkens*, an American Indian, although born in the United States, was held not to be a citizen by birth. The Court held that the meaning of the clause was "not merely subject to

⁶ U.S. Constitution. Amend. XIV § 1, cl. 1.

⁷ *Citizenship without Consent, Illegal Aliens in the American Polity*, Yale Univ. Press (1985)

some respect or degree to the jurisdiction of the United States, *but completely subject to their political jurisdiction, and owning them direct and immediate allegiance.*"⁸

While the phrase "subject to the jurisdiction" is borrowed from monarchal English common law, "subject to" has a different meaning under a democratic form of government than it does under a monarchy. There is great a difference between the territorial allegiance claimed by a hereditary sovereign on feudal principles and the personal right of citizenship participated in by all the members of the political community.

Nevertheless, even under English common law, from which American law springs, it was held in the famous 1608 Calvin's Case that it is "neither the climate nor the soil, but *ligeantia* (allegiance) and *obedientia* (obedience) that makes the subject born."⁹

Calvin's Case, which is cited in both the Wong Kim Ark case and *Elk v. Wilkens* above, makes it clear that allegiance, not place of birth, is the determining factor in whether a person is "subject to" a jurisdiction. In Calvin's Case, this allegiance was distinguished by whether a subject could be tried for treason to the sovereign, or be drafted into the military.

Justice Gray, in delivering his opinion in the Wong Kim Ark case, which decided the citizenship status of the child of legal permanent aliens, drew the distinction between a temporary sojourner and a legal permanent resident and wrote, "an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, *and may be punished for treason*, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations."¹⁰ Thus, the legal permanent resident is "completely subject to" the "political jurisdiction" of the United States and owes them "direct and immediate allegiance," but must, as a condition of his "subject to," possess the characteristic of being triable for treason.

Therefore, illegal aliens, temporary workers, and tourists are not "completely subject to" the "political jurisdiction" of the United States and do not owe them "direct and immediate allegiance." Neither a Saudi national working temporarily in the United States, nor a Korean tourist, nor a Mexican illegal alien may be tried for treason to the United States or be drafted into the military.

In other words, the language of the Fourteenth Amendment demands complete allegiance and, indeed, the Oath of Citizenship makes it explicit.¹¹

Therefore, for this and for reasons discussed below, the current practice of granting automatic birthright citizenship to the children of tourists, temporary workers, and illegal aliens is not necessarily constitutional, and from this it may be maintained that Mr. Hamdi is not, in fact, an American citizen.

Legislative intent clearly not to include persons in Mr. Hamdi's circumstances

The intent of Congress, as recorded in the ratification debates for the Fourteenth Amendment, indicates that the framers of the Amendment did not intend it to provide a blanket right to citizenship to anyone

⁸ 112 U.S. 94, at 102

⁹ Calvin's Case, 7 Rep. 1 6b

¹⁰ 169 U.S. 649

¹¹ "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same..."

who happened to have been born on U.S. territory. As one of the authors of the Amendment, Senator Jacob Howard, stated precisely in the debate, "This will not, of course, include persons born in the United States who are *foreigners, aliens*, who belong to families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons."¹²

Mr. Hamdi, as the offspring of aliens temporarily in the United States, is excluded from birthright citizenship by the intent of the drafters of the Amendment.

The particular circumstances of Mr. Hamdi's birth have never been determined by the Supreme Court to warrant automatic *jus soli* citizenship, and, in fact, judicial precedent argues against birthright citizenship for Mr. Hamdi.

For issues as large and important as immigration and naturalization, judicial guidance has been sadly lacking.

Fourteenth Amendment excludes children of aliens generally

Supreme Court Justice Miller, in delivering the opinion in the Slaughter-House Cases, the first major judicial interpretation of the Fourteenth Amendment's "subject to the jurisdiction" clause, affirmed the avowed purpose of the Fourteenth Amendment to confer citizenship upon African Americans and to expressly overturn the Dred Scott ruling.¹³ He noted that the phrase "subject to the jurisdiction thereof" was "intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States."¹⁴ The Slaughter-House Cases thus excluded not only foreign diplomats from those subject to U.S. jurisdiction, but also aliens generally and their children.

Distinction drawn between children of aliens and children of citizens

In the 1874 case *Minor v. Happersett*, the Court noted that the Constitution confers citizenship either through birth within the United States or through naturalization: "[I]t was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also."¹⁵ The Court also specifically noted a distinction between the children of citizens and the children of aliens "or foreigners."¹⁶

Temporary submission lacks the permanence inherent in a complete surrender to jurisdiction

Following *Minor*, the Court elaborated on the definition of the term "citizen" in *United States v. Cruikshank*.¹⁷ The Court described citizens as persons who "have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights."¹⁸ Unlike other persons, a citizen is one who has actively submitted to the jurisdiction of the United States. Under this definition, temporary submission by an alien lacks the permanence and promise of allegiance inherent in a complete surrender to jurisdiction. Read together, *Cruikshank* and *Minor* illustrate the Court's willingness to allow the exclusion of children born to alien parents on U.S. soil from the operation of the Fourteenth Amendment's citizenship clause. Those

¹² Congressional Globe, May 30, 1866, 39th Congress, 1st Session, p. 2893

¹³ 83 U.S. 36 (1873)

¹⁴ Id. at 73

¹⁵ 88 U.S. 162, 167 (1874)

¹⁶ Id.

¹⁷ 92 U.S. 542 (1875)

¹⁸ Id. at 549

who submitted only temporarily to the jurisdiction and protection of the U.S. government were not included within the parameters of this conception of citizenship, and additionally, the Citizenship Clause did not cover their children.

"Subject to the jurisdiction" requires "direct and immediate allegiance"

Another early case to discuss the meaning of "subject to the jurisdiction thereof," *Elk v. Wilkins*,¹⁹ concerned a Native American born within U.S. federal territory under the jurisdiction of his tribe. After leaving his tribe for society at large, John Elk claimed he had been born within the United States, "had severed his tribal relation to the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States."²⁰ He posited the immediate right to be recognized as a U.S. citizen. The court disagreed.

Justice Gray's majority opinion interpreted "subject to the jurisdiction" to mean complete subjection to U.S. political jurisdiction, which requires "direct and immediate allegiance" to the country.²¹ The Court reasoned that, absent evidence that his parents had submitted themselves to U.S. jurisdiction, Elk's birth on tribal lands precluded his complete subjection to the jurisdiction of the United States. The Court also held that Elk could not become a citizen without the formal consent of the United States: "To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form."²²

Thus mutuality of consent and full allegiance were deemed essential elements of citizenship. Since Elk did not acquire citizenship at birth, the Court found that his only means of attaining it would be the formal processes dictated by treaty or naturalization law.

The circumstances of Mr. Hamdi's birth (and his later willingness to take up arms against the United States) argues strongly against the claim that he possesses "direct and immediate allegiance" to the United States—or citizenship therein—by virtue of the mere accident of his birth in Louisiana.

Automatic birthright citizenship especially not applicable in present case

In *United States v. Wong Kim Ark*, the Supreme Court addressed the question of whether lawfully resident aliens, themselves ineligible for citizenship, could pass U.S. citizenship on to their children. It found that a "child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a *permanent domicil and residence* in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution."²³

As Saudi subjects in the United States on a temporary visa, Mr. Hamdi's parents were not *permanently domiciled* in the United States, and thus, for this, and for the reasons stated above, a child born to them cannot claim citizenship by virtue of the ruling in the *Wong Kim Ark* case—the case on which is mistakenly based the current custom of automatic birthright citizenship for the offspring of illegal aliens, temporary workers, and tourists.

¹⁹ 112 U.S. 94 (1884)

²⁰ *Id.* at 95

²¹ *Id.* at 102

²² *Id.* at 109

²³ 169 U.S. 649 (1898)

Supreme Court has never expressly confirmed birthright citizenship for the children of illegal aliens, temporary workers, and tourists

The closest the Supreme Court has ever come to addressing the citizenship status of persons born in Mr. Hamdi's circumstances was the 1982 case, *Plyler v. Doe*. In *Plyler v. Doe*,²⁴ the Court adopted a view implying that "jurisdiction" was meant to include American-born children of illegal aliens. However, this implication was only dictum, and it was given only cursory treatment in a footnote.

Furthermore, it does not apply to the situation under consideration in any case. The *Plyler* case revolved around the question of how society should treat the offspring of illegal aliens, when the illegal status of the parents is ignored or tacitly condoned. *Plyler* considered whether the children of illegal aliens could attend public schools while their parents remain illegally in the United States.

Mr. Hamdi's situation is entirely different. His parents were reportedly in the United States legally at his birth, and in his case there is no large social question of what to do in the absence of immigration law enforcement. Unlike the questions addressed in *Plyler v. Doe*, the question at hand is explicitly whether the Fourteenth Amendment gives automatic birthright citizenship to persons in Mr. Hamdi's circumstances.

The Supreme Court has never directly addressed this question.

Conclusion

It is thus by no means a *fait accompli* that Yaser Esam Hamdi is a citizen of the United States. Rather, a close reading of the Fourteenth Amendment, and subsequent case law, will reveal he is not. Furthermore, plain common sense, for which there is surely a place in jurisprudence, would demand a declaration that Mr. Hamdi is, in fact, a citizen of Saudi Arabia.

²⁴ 457 U.S. 202, 211 n.10 (1982)

PO Box 8122

Omaha 68108-0122



7002 0460 0003 1690 9733

RETURN RECEIPT
REQUESTED



U.S. POSTAGE
PAID
OMAHA, NE
68108-02
AUG 11 2004
AMOUNT

\$465

00046505-04

0000



INSPECTED BY
JOHNSON

Clerk of the Court - Civil

Walter E. Hoffman U.S. Courthouse

600 Granby St.

Norfolk, VA 23510

SEP 12 10 38

RETURN RECEIPT
REQUESTED

Amaha 68108-0122



7002 0460 0003 1690 9733
RETURN RECEIPT
REQUESTED



U.S. POSTAGE
PAID
OMAHA, NE
68108-0122
AUGUST 1992
AMOUNT

\$465
000-46505-04

0000



INSPECTED BY
JOHNSON

Clerk of the Court - Civil
Walter E. Hoffman U.S. Courthouse
600 Granby St.
Norfolk, VA 23510

RETURN RECEIPT
REQUESTED

Motion to Intervene - Hamdi v. Rumsfeld